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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. 313.

SWIFT & COMPANY, a Corporation,
Petitioner,

vs.

JOHN DOE et al., (Persons Names Are Otherwise Unknown to Plaintiffs); NICHOLAS M. BLASSIE, AUGUST GIESEKE, Individually and as Representatives of LOCAL UNION NO. 88; and LOCAL UNION NO. 88, AMALGAMATED MEAT CUTTERS and BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
Respondents.

REPLY BRIEF

Of Petitioner, Swift & Company, to Respondents' Brief in Opposition to the Petition for a Writ of Certiorari.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 623.

SWIFT & COMPANY, a Corporation,
Petitioner,

vs.

JOHN DOE et al. (Whose Names Are Otherwise Unknown to Plaintiff); NICHOLAS M. BLASSIE, AUGUST GIESEKE, Individually and as Representatives of LOCAL UNION NO. 88; and LOCAL UNION NO. 88, AMALGAMATED MEAT CUTTERS and BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
Respondents.

REPLY BRIEF

Of Petitioner, Swift & Company, to Respondents' Brief in Opposition to the Petition for a Writ of Certiorari.

As briefly as possible, and without effort to argue the points or provide lengthy authoritative citations, we call attention to the following more serious errors in Respondents' Brief in Opposition.

I. The State Court Petition Did Not Allege Union Unfair Labor Practices.

International Union v. W. E. R. B., 336 U. S. 245, and other cases cited at page 16, footnote 14, of our Petition

herein, clearly holds that conduct which may in some respects resemble the "particular union conduct" prohibited by the Federal Act, is **not** covered thereby, and, being neither sanctioned nor proscribed by the Act, is therefore "governable by the state". **Weber v. Anheuser-Busch**, 348 U. S. 468, reaffirmed that holding as a proper statement of the law.

In its state court petition, plaintiff (Petitioner here) **did not** allege that the union's conduct constituted any unfair labor practice listed in Section 8 of the Act. Nor did such petition allege that the union's conduct "was violative of the Labor Management Relations Act" as Respondent asserts (Brief in Opposition, page 7). Conduct "violative" of the Act is defined in Section 8 which describes specific unfair practices, none of which are involved in the Union's conduct in this case as the Respondents themselves agree (Brief in Opposition, page 11). But the "policy" of the Act announced in Section 7 thereof is consistent with the policy of Art. I, Sect. 29 of the Missouri Constitution in guaranteeing employees a free uncoerced choice of their own representative. The Federal Act provides no remedy against conduct contrary to the policy of Section 7; Missouri provides a remedy for conduct contrary to Art. I, Sect. 29. What petitioner pled in its state court petition was that the union's conduct was "contrary to" the Act's policy thereby showing that such conduct was **not protected by Section 7 of the Federal Act** and that application of Missouri's remedy under Art. I, Sect. 29, could not possibly conflict with federal policy as expressed in the Act.[1] Accordingly, as stated in **International Union**, 336 U. S. 245, and **Weber**, 348 U. S. 468, such conduct is "governable by the state" and preemption does not apply.

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[1] See Petition for Certiorari herein, Point A, pages 13-19.

II. The Charges Filed With the Board Were Filed to Aid the State Court in Determining Jurisdiction and Were Not Inadequate.

This case was tried and submitted prior to **Garner**, 346 U. S. 485, and **Kinard**, 346 U. S. 933. Those decisions were called to the trial judge's attention and supplemental agreement was had to explain their effect. Swift maintained that the union conduct involved was not an unfair practice that the Board could govern under Section 8 of the Federal Act, and that filing charges would be a futile act. At the trial judge's request, to assure him on this point, Swift agreed to file charges under the particular sections that the union then claimed to be applicable, and, as Swift had predicted, the Regional Director dismissed them as the conduct alleged was "not within the scope of" such sections of the Federal Act. To the extent that Swift "alleged unfair labor practices" it was for the purpose of proving to the trial judge that the Act did not apply in the very manner tacitly suggested by this Court in its opinions in **Garner** and **Kinard**, supra.

Respondents attempted analogy to the failure of **Anheuser-Busch** to file charges under all the appropriate unfair practice sections must fail (Brief in Opposition, page 9). There the Board dismissed Busch's charge filed under Sec. 8 (b) (4) (D) **only**. In the state court, Busch specifically alleged violations of Section 8 (b) (4) (A) and (B) in addition to (D). This Court held that the Board's dismissal of the (D) charge did not completely negate existence of a federal remedy and potential conflict. But this Court said:

> "If a ruling on (D) necessarily encompassed a ruling on the other subsections, **we would have a different case.**" **Weber v. Anheuser-Busch**, 348 U. S. at 478.

This is that "different case". The only federal sections even theoretically involved here are 8 (b) (1) (A) and

8 (b) (2) and both charges were submitted and dismissed by the Regional Director because the Union's conduct was not within their scope. Respondents' contention that the 8 (b) (1) (A) charge was faulty in failing to allege that the Union's purpose was to directly "force employees" is frivolous quibbling (Brief in Opposition, page 9). The very text of Section 8 (b) (1) (A) prohibits a union "to restrain or coerce employees" so the mere allegation that the section is violated by the Union's conduct inherently includes the allegation Respondent claims to be missing.

The procedure followed in this case is exactly that contemplated by **Garner, Kinard** and **Anheuser-Busch** to negate existence of federal control in the Board "in the first instance".

III. The Respondents Have Completely Misinterpreted the Constitutional Issue Presented.

Respondent misconceives the constitutional issue presented by the Petition for Certiorari. They state it to be whether the Act's failure to provide an appeal from the Board General Counsel's refusal to issue a complaint violates the Fifth and Fourteenth Amendments (Brief in Opposition, page 2, Question 3).

While that problem may present a valid question for decision in some other case,[2] the present case does **not** directly question the validity of the procedure set up by Congress for prosecuting or not prosecuting alleged violations of the specific unfair practices "(listed in Section 8)" over which the NLRB **was given** express judicial jurisdiction and power. The present case is the exact opposite of the one where such an issue as phrased by

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[2] Compare Leedom v. Kyne, ... U. S. ..., 3 L. Ed. (2) 210, 215: "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers."

Respondent could arise. Here Congress made "no express delegation of power to the Board to permit or forbid this particular union conduct" and "no proceeding is authorized by which the Federal Board may deal with it in any manner". International Union v. W. E. R. B., 336 U. S. at 253. The constitutionality of the General Counsel's proper refusal to prosecute in such a case, and the lack of appeal therefrom, cannot be the issue here.

The constitutional issues actually presented are stated in the Petition (pages 5-6, Points II and III). We will not here repeat them or the argument set out in the Petition (pages 19-24, Points B and C). Briefly, however, they raise the fundamental issue of due process in its primary sense as guaranteed by the Fifth and Fourteenth Amendments, namely that (1) everyone is entitled to his day in Court before some competent tribunal with jurisdiction to hear the matter and grant the relief provided by the general law; and (2) where there is a right there is a remedy. Truax v. Corrigan, 257 U. S. 312; Brinkerhoff-Faris T & S Co. v. Hill, 281 U. S. 673. Here a wrong has been committed. Federal law does not prohibit or protect the wrongful conduct which is outside the scope of the federal tribunal's jurisdiction. The federal Act provides no substitute for the traditional state remedy. There can be and has been no day in any federal court. If the state court is also without jurisdiction, a jural vacuum exists, and Due Process as defined by this Court, is denied. That is the Constitutional issue presented.

IV. The Issues Here Presented Were Not Decided by Fairlawn.

Respondent argues that a day in court would not aid Swift because no unfair labor practice is involved (Brief in Opposition, page 11). They apparently believe that the world of wrongful conduct ends with Section 8 (b). Inter-

national Union, Anheuser-Busch, Algoma Plywood, Laburnum, and other decisions of this court show that position is erroneous.

Fairlawn and its companion cases[3] all dealt with conduct specifically found to come within the scope of the unfair labor practice proscription in Section 8. In each case the Board clearly had judicial jurisdiction of the subject matter under the express language of the Act. In each case the Board only declined to exercise that jurisdiction due to insubstantial volume of commerce, i. e., the employers involved were the type of persons the Board would not assist under its voluntarily imposed restrictions. The question presented there was, in essence: where the Act confers jurisdiction of both the subject-matter and the person, and the Board voluntarily attempts to restrict the persons it will serve on a volume of commerce basis, do the states regain jurisdiction of the subject-matter in cases involving the excluded persons? **Fairlawn** said "no" and indicated the Board could, and possibly should, terminate the exclusion.

By contrast, our present case is one where the subject-matter itself, the union conduct here involved, is neither protected nor proscribed by the Act, and the Board is not authorized to deal with it in any manner. **International Union v. W. E. R. B.**, 336 U. S. at 253. The Board is completely powerless to correct this situation by the simple process of changed volume-of-business standards. Clearly this is the area that is governable by the state or entirely ungoverned. Where that is the choice, this Court ruled against anarchy. **International Union**, supra; **Algoma P & V Co.**, supra; **Weber v. Anheuser-Busch**, supra.

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[3] A. M. C. & B. W. N. A. v. Fairlawn, 353 U. S. 20; Guss v. Utah LRB, 353 U. S. 1; San Diego B. T. C. v. Garmon, 353 U. S. 26.

CONCLUSION.

We respectfully submit that the issues presented by the Petition are so serious and of such widespread importance, and involve such important constitutional aspects that the writ should be granted.

Respectfully submitted,

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